

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**BRIARWOOD THIRTEEN, LLC v. BOARD OF ASSESSORS OF
THE CITY OF SPRINGFIELD**

Docket Nos. F327148
F327149

Promulgated:
October 24, 2018

These are appeals heard under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Springfield ("appellee" or "assessors") to abate taxes on certain parcels of real estate located in Springfield owned by and assessed to Briarwood Thirteen, LLC ("appellant"), under G.L. c. 59, §§ 11 and 38, for fiscal year 2015 ("fiscal year at issue").

Commissioner Chmielinski heard these appeals. Chairman Hammond and Commissioners Scharaffa, Rose, and Good joined him in the decisions for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Lester Seidman, pro se, for the appellant.

Kathleen T. Breck, Esq., Deputy City Solicitor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2014, the relevant valuation and assessment date for the fiscal year at issue, the appellant was the assessed owner of the two parcels at issue in these appeals ("subject properties"): an 8,778-square-foot parcel of land improved with an office/retail building located at 55 State Street in Springfield ("subject building"), and an 11,230-square-foot parcel of land used as a parking lot located behind the 55 State Street parcel with an address of 58-60 Bliss Street ("subject parking lot").

For the fiscal year at issue, the assessors valued the subject properties at \$909,700 - valuing the subject building and its parcel at \$682,200 and the subject parking lot at \$227,500. They assessed a tax on the subject properties, at a rate of \$38.77 per \$1,000, in the total amount of \$35,269.07 - \$26,448.89 for the subject building and its parcel and \$8,820.18 for the subject parking lot. The appellant timely paid the taxes due without incurring interest and, in accordance with G.L. c. 59, § 59, timely filed an abatement application for each parcel

on January 30, 2015. The assessors denied the abatement applications on April 23, 2015, and on May 15, 2015, the appellant seasonably filed appeals under the informal procedure with the Board. On June 15, 2015, within thirty days of the date of service of the informal petition, the appellee elected to transfer the appeals from the informal to the formal procedure. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the instant appeals.

The appellant presented its case-in-chief through the testimony of Lester Seidman, the manager of the subject properties, and the submission of documents consisting of photographs of the subject properties and profit and loss statements for the subject properties for fiscal years 2013, 2014, and 2015.

Mr. Seidman testified that the appellant purchased the subject properties in March of 2011, at a time during which Springfield was continuing to struggle through an economic downturn, particularly in the industrial and manufacturing sectors. The subject properties, however, appeared to Mr. Seidman to be a relatively safe investment, as the subject building was fully occupied by many long-term tenants; the offices of the Hampden County District Attorney and the State Police had been tenants for

approximately eighteen years at the time when the appellant purchased the subject properties. These two tenants occupied about two-thirds of the subject building, which was conveniently located in close proximity to the Hampden County courthouse. The appellant purchased the subject properties for \$1,130,000.

Three months later, on June 1, 2011, a tornado struck Springfield. The subject properties were within its path and sustained substantial damage. With the exception of two minor tenants on the first floor, all of the tenants in the subject building abandoned the space. The two major tenants were offered free space several blocks away, and they remained in that space as of the date of the hearing. As of the January 1, 2014 valuation date, Mr. Seidman testified that the subject building was about 70 percent repaired and the subject parking lot was usable. Mr. Seidman testified that the appellant has been unsuccessful in leasing the vacant space in the subject building to new tenants.

On June 13, 2014, a little over five months after the relevant valuation date, Springfield was awarded one of the Legislature's four proposed casino developments. However, the casino license for Springfield was not finalized until November 6, 2014, after the state-wide ballot effort to

repeal the gaming law was defeated. Springfield selected MGM as the casino developer.

The appellant contended that the proposed MGM casino negatively impacted the subject properties and its ability to attract new tenants. Mr. Seidman testified that MGM had closed off a portion of the street "around the general time frame" of the relevant valuation date in order to build the casino, and claimed that this affected access to the subject properties. Mr. Seidman further claimed that MGM released a map of the proposed casino development, which mistakenly portrayed the subject properties as within the casino development "footprint" and thus slated for demolition. Mr. Seidman contended that this error negatively impacted the appellant's ability to attract new tenants to the subject building, because prospective tenants assumed it was slated for demolition. However, Mr. Seidman admitted on cross-examination that the casino award was not finalized until late in 2014, and thus no MGM construction had begun, and no road closures were in effect as of the relevant valuation date. Furthermore, the appellant failed to offer proof as to when the map of the proposed "footprint" was released, so the Board likewise found that this map was not a factor as of the relevant

valuation date, which was before the ballot initiative in November of 2014.

The appellant performed a valuation analysis utilizing the subject properties' profit and loss statements. Mr. Seidman testified that after the tornado, the subject building was no longer an income-producing property, particularly because the appellant could not attract tenants to replace those that had vacated. The profit and loss statements that the appellant offered showed net losses for the subject properties for three fiscal years. The appellee countered that these profit and loss statements contained expense items that are not properly considered in a valuation analysis for real estate tax purposes, including taxes, mortgage interest, legal and consulting costs, and certain one-time expenses. Based on Mr. Seidman's income analysis, the appellant's opinion of value for the subject properties was \$350,000 - \$300,000 for the subject building and parcel and \$50,000 for the subject parking lot.

The appellee presented its case through the testimony of Matthew Fontaine, an assessor with the appellee, and several documents, including: the requisite jurisdictional documents; property record cards for the subject properties and a number of purportedly comparable properties; and a

sales comparison grid to summarize the appellee's analysis. Patrick Greenhalgh, another assessor with the appellee, and Richard Allen, chairman of the appellee, also responded to questions posed by the presiding Board member during the hearing.

Mr. Fontaine testified that the appellee did not rely on the income-capitalization approach to value the subject properties, because the subject properties were not income-producing as a commercial office building and ancillary parking lot as of the relevant assessment date. Mr. Fontaine testified that it would not be fiscally prudent for an investor to restore the subject building for use as an office building, given the tornado damage sustained by the subject properties. Instead, the appellee determined that the highest and best use of the subject properties was as vacant land that could be held for future development.

Mr. Fontaine testified that the casino development was driving property values in the immediate area of the site. He presented a sales-comparison analysis using properties that were both outside of the proposed casino "footprint," like the subject properties, and those that were inside the proposed "footprint." The Board noted, however, that many of Mr. Fontaine's comparable sales occurred more than a

year after the relevant valuation date, and thus after the casino was actually awarded to Springfield. Mr. Fontaine's comparable-sales analysis is summarized in the table below:

Sales outside the proposed casino "footprint"

Comparable	#1: 24 Park St.	#2: 1173 East Columbus Ave., 1179 East Columbus Ave., 72 William St., and N/S Williams St.	#3: 77 Wilcox St.
Sale date	02/10/2015	10/25/2015	02/03/2015
Sale price	\$625,000	\$750,000	\$133,000
Land size	0.3843 acres	0.4444 acres	4,902 sf
Value psf	\$37.34 psf	\$38.74 psf	\$27.13 psf
Location	1 block from subject properties; zoned for commercial use	1 block from subject properties; zoned for commercial use	
Notes	Arm's-length sale; improved with a large mill building now condemned. Highest and best use would be to demolish and hold for future development.	Arm's-length sale; buyers are local investors who have purchased several properties around the proposed casino site; purchased for future development.	Improved with a 2-family residence; purchased to be redeveloped.

Mr. Fontaine testified that he put the most weight on Comparables #1 and #2, because they were the most similar to the subject properties. He opined that adjustments were not needed for the slight differences between these properties and the subject properties. He also noted that these properties were likely to be demolished and redeveloped, and that the purchasers were not MGM or

related entities. Mr. Fontaine testified that he averaged the selling prices per square foot for Comparables #1 and #2 and applied this \$38.04-per-square-foot value to the subject properties' total 20,071 square feet to derive a raw land value of \$761,070.¹ Since the comparable properties all included buildings that were to be demolished, Mr. Fontaine then added the cost of demolition to the raw land value. Based on recent demolition permits on file with the appellee, he determined the cost of demolition to be \$6 per square foot of building space, and thus derived a demolition cost of \$154,014. He added this demolition cost to the land value, which yielded an indicated value of \$915,084 for the subject properties for the fiscal year at issue, which slightly exceeded its assessed value of \$909,700.

Mr. Fontaine testified that he gave less weight to his three comparable-sale properties that were located inside the proposed casino "footprint." He further explained that all three of these properties contained structures that were either removed or demolished. Mr. Fontaine's analysis for these properties is summarized in the table below:

¹ The Board notes minor mathematical errors in Mr. Fontaine's calculation, specifically his figure for the subject properties' total square footage (which should be listed as 20,008 square feet) and the raw land value derived therefrom (which should be \$761,104.32).

Sales inside the proposed casino "footprint"

Comparable	#1: Bliss St.	#2: 82 Howard St.	#3: 37 Howard St.
Sale date	01/22/2013	09/28/2012	04/30/2013
Sale price	\$750,000	\$1,000,000	\$1,500,000
Land size	0.1377 acres	0.4424 acres	0.3663 acres
Value psf	\$120.97 psf	\$51.89 psf	\$94.01 psf
Location	Superior location, within casino "footprint"	Superior location, within casino "footprint"	Superior location, within casino "footprint"

Mr. Fontaine testified that he gave more weight to Comparables #2 and #3 because their land sizes were more comparable to the subject properties; Comparable #2 in particular, at 0.4424 acres, was essentially identical to the subject properties' land area of 0.4444 acres. He noted that the sale price for Comparable #2 - \$51.89 per square foot - was higher than the value that the assessors attributed to the subject properties' land value, and would yield a higher fair market value than the subject assessments, even without considering demolition costs. Mr. Fontaine concluded that these comparable-property sales also supported the subject assessments.

Mr. Fontaine testified that the assessors considered the cost approach to value, but only as support for their sales-comparison approach analysis.

Mr. Fontaine concluded that the subject assessments were a reasonable valuation of the subject properties.

Upon weighing the evidence, the Board found that the appellant failed to meet its burden of proving a value for the subject properties that was less than their assessed values. Given the tornado damage to the subject properties, and the economic downturn experienced by Springfield as pointed out by Mr. Seidman, the highest and best use of the subject properties was not as an office/retail building with an attendant commercial parking lot, but instead as vacant land to be held for future development. Moreover, the appellant's valuation analysis was based upon profit and loss statements, which contained expense items that are not properly considered in a valuation analysis for real estate tax purposes. The Board was thus not persuaded by Mr. Seidman's income analysis.

The casino development was not officially awarded until five months after the relevant assessment date. Therefore, the Board likewise was not persuaded by Mr. Fontaine's comparable-sales analysis, which used sales occurring after the casino was awarded to Springfield and thus heavily influenced by the proposed development. However, 82 Howard Street, a property essentially identical to the subject properties in size that was sold for future development, garnered a sale price of \$51.89 per square

foot, which was higher than the value that the assessors attributed to the subject properties' land.

On the basis of these findings, the Board found and ruled that the appellant failed to meet its burden of proving a value for the subject properties that was lower than their assessed values. Accordingly, the Board issued decisions for the appellee in these appeals.

OPINION

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549, 566 (1956).

"The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.'" ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). In appeals before this Board, a taxpayer "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which

undermines the assessors' valuation." **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 600 (1984) (quoting **Donlon v. Assessors of Holliston**, 389 Mass. 848, 855 (1983)). "[T]he board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.'" **General Electric Co.**, 393 Mass. at 598 (quoting **Schlaiker**, 365 Mass. at 245).

"Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most." **Tennessee Gas Pipeline Co. v. Assessors of Agawam**, Mass. ATB Findings of Fact and Reports 2000-859, 875 (citing **Conness v. Commonwealth**, 184 Mass. 541, 542-43 (1903) and **Irving Saunders Trust v. Assessors of Boston**, 26 Mass. App. Ct. 838, 843 (1989) and the cases cited therein). "[T]he phrase 'highest and best use' implies the selection of a single use for a single property and . . . the Board is required to make its best judgment as to what that use is likely to be, considering all the evidence presented." **New England Telephone and Telegraph Co. v. Assessors of Framingham**, Mass. ATB Findings of Fact and Reports 1988-95, 150.

A property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 335 (14th ed., 2013); see also ***Skyline Homes, Inc. v. Commonwealth***, 362 Mass. 684, 687 (1972); ***DiBaise v. Town of Rowley***, 33 Mass. App. Ct. 928 (1992). While property cannot be valued on the basis of hypothetical or future uses that are remote or speculative, see ***Skyline Homes***, 362 Mass. at 687, ***Tigar v. Mystic River Bridge Authority***, 329 Mass. 514, 518 (1952), and ***Salem Country Club, Inc. v. Peabody Redevelopment Authority***, 21 Mass. App. Ct. 433, 435 (1986), "the Board is required to make its best judgment as to what [the highest and best] use is likely to be, considering all the evidence presented. . . . [T]his process involves some uncertainty." ***New England Telephone and Telegraph Co.***, Mass. ATB Findings of Fact and Reports at 1988-150.

In the present appeals, the Board ruled that, contrary to the appellant's assumption, the highest and best use of the subject properties was not as an office/retail building with attendant parking lot, but rather as vacant land to be held for future development. The appellant offered a valuation based on the subject properties' continued use as office/retail space with commercial parking. However, this use was not financially feasible or maximally productive,

given the extensive tornado damage as well as the economic downturn and resulting dearth of available commercial/retail tenants that Mr. Seidman himself lamented. A willing buyer fully apprised of the subject properties' condition "would purchase the propert[ies] at a price reflecting that reality." **Kunz v. Assessors of Middleton**, Mass. ATB Findings of Fact and Reports 2006-211, 222. The Board thus found that Mr. Seidman's analysis based on that flawed foundation did not provide a reliable indicator of the subject properties' fair cash value for the fiscal year at issue.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. **Correia v. New Bedford Redevelopment Authority**, 375 Mass. 360, 362 (1978). "The board is not required to adopt any particular method of valuation," **Pepsi-Cola Bottling Co. v. Assessors of Boston**, 397 Mass. 447, 449 (1986), but the income-capitalization method "is frequently applied with respect to income-producing property." **Taunton Redev. Assocs. v. Assessors of Taunton**, 393 Mass. 293, 295 (1984).

Under the income-capitalization approach, valuation is determined by dividing net operating income by a capitalization rate. See **Assessors of Brookline v. Buehler**, 396 Mass. 520, 522-23 (1986). After accounting for vacancy and rent losses, the net operating income is obtained by deducting the appropriate expenses. **Pepsi-Cola Bottling Co.**, 397 Mass. at 452-53. The capitalization rate should reflect the return on investment necessary to attract investment capital. **Taunton Redev. Assocs.**, 393 Mass. at 295. "The issue of what expenses may be considered in any particular piece of property is for the board." **Alstores Realty Corp. v. Assessors of Peabody**, 391 Mass. 60, 65 (1984). The appellant's valuation analysis was based upon profit and loss statements, which contained expense items that are not properly considered in a valuation analysis for real estate tax purposes. The Board was thus not persuaded by Mr. Seidman's capitalization-of-income analysis.

The appellee offered a sales-comparison analysis using sales from both inside and outside the proposed casino "footprint." Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. **McCabe v.**

Chelsea, 265 Mass. 494, 496 (1929). When comparable sales are used, however, adjustments must be made for various factors that would otherwise cause disparities in the comparable prices. See **Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke**, Mass. ATB Findings of Fact and Reports 1998-1072, 1082.

The Board here found that the appellee's sales-comparison analysis was for the most part unpersuasive because it relied primarily on sales that had occurred after the casino was awarded to Springfield and were thus influenced by the prospective casino development. However, one of Mr. Fontaine's comparable properties, 82 Howard Street, did provide support for the subject assessments, as this sale occurred prior to the casino award, and the square footage of that property was essentially identical to the subject properties.

The burden of proving a value that is lower than the assessed value is firmly on the taxpayer. See **Schlaiker**, 365 Mass. at 245. The Board found and ruled that the appellant failed to meet its burden of proving a value for the subject properties that was less than their assessed values for the fiscal year at issue.

Accordingly, the Board issued a decision for the appellee in these appeals.

THE APPELLATE TAX BOARD

By:

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:

Clerk of the Board